62

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In The

Supreme Court of the United States

CLAYTON EDWARDS, in his individual capacity,

Petitioner,

v.

DAVID KENYON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, alleging that Petitioner used excessive force in effectuating the arrest of the Respondent, qualified immunity was properly denied where the reviewing Court of Appeals, en banc, affirmed the District Court's denial of qualified immunity "by vote of an equally divided court" in a case involving an alleged violation of a discrete constitutional right never before recognized by this Court and specifically disclaimed by other Courts of Appeals which have considered the question?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	7
I. A purported constitutional right cannot be "clearly established," for qualified immunity purposes, where the reviewing Circuit Court of Appeals, en banc, is "equally divided" on the question, this Court has never recognized the purported right, and the other Courts of Appeals which have considered the issue have specifically disclaimed the purported right	9
II. The fixed "order of battle" announced in *Saucier v. Katz* should be reconsidered, overruled, and/or modified to the extent necessary to allow reviewing courts to consider the qualified immunity questions in the order that makes the most sense in the particular context of the case so that where, as here, the qualified immunity question is easily answered in the negative, the case can be readily dismissed on qualified immunity without unnecessary constitutional decisionmaking	13

TABLE OF CONTENTS – Continued

Page

III. The act of taking a suspect's arms behind his back to handcuff him, incident to a valid arrest based upon probable cause, does not violate the suspect's Fourth Amendment rights, regardless of allegations that the officer took the suspect's arms back in an "unnatural," "high," or even "painful" manner and regardless of whether the suspect suffered injury.... 20

IV. The "equally divided court rule," which calls for affirmance of the trial court where the vote of an appellate court is evenly split, is not appropriate in the context of an interlocutory appeal of the denial of a public official's qualified immunity; rather, an equally divided appellate court vote should result in a grant of qualified immunity to the defending public official..... 28

CONCLUSION 30

Appendix A – Order and Judgment of the United States Court of Appeals for the Eighth Circuit (Jan. 18, 2007).....App. 1

Appendix B – Order of the United States District Court for the Eastern District of Arkansas (Aug. 31, 2005).....App. 4

Appendix C – Opinion of the panel of the United States Court of Appeals for the Eighth Circuit, vacated (Sept. 7, 2006).....App. 11

Appendix D – Order of the United States Court of Appeals for the Eighth Circuit denying rehearing (May 1, 2007).....App. 26

TABLE OF AUTHORITIES

Page

CASES

African Trade and Info. Ctr. v. Abromaitis, 294 F.3d 355 (2nd Cir. 2002) 16

Anderson v. Creighton, 483 U.S. 635 (1987) 9, 13, 25

Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912 (9th Cir. 2001) 23

Behrens v. Pelletier, 516 U.S. 299 (1996) 17

Braun v. Baldwin, 346 F.3d 761 (7th Cir. 2003) 24

Brissett v. Paul, 141 F.3d 1157 (4th Cir. 1998) 22, 23

Brosseau v. Haugen, 543 U.S. 194 (2004) .....*passim*

Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002) 24

Carter v. Morris, 164 F.3d 215 (4th Cir. 1999) 24

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 14, 18

Crumley v. City of St. Paul, Minn., 324 F.3d 1003 (8th Cir. 2003) 24

DiMeglio v. Haines, 45 F.3d 790 (4th Cir. 1995) 15, 16

FCC v. WOKO, Inc., 329 U.S. 223 (1946) 21

Foster v. Metropolitan Airports Comm'n, 914 F.2d 1076 (8th Cir. 1990) 22, 24

Glenn v. City of Tyler, 242 F.3d 307 (5th Cir. 2001) 24

Graham v. Connor, 490 U.S. 386 (1989) 12, 25

Greiner v. City of Champlin, 27 F.3d 1346 (8th Cir. 1994) 24

Hope v. Pelzer, 536 U.S. 730 (2002) 25

Horne v. Coughlin, 191 F.3d 244 (2nd Cir. 1999) 16

Hunter v. Bryant, 502 U.S. 224 (1991) 17

TABLE OF AUTHORITIES – Continued

Page

Kalka v. Hawk, 215 F.3d 90 (D.C. Cir. 2000) 14

Kenyon v. Edwards, 462 F.3d 802 (8th Cir. 2006) 5, 11

Kwai Fun Wong v. United States, 373 F.3d 952 (9th Cir. 2004) 17

Littrell v. Franklin, 388 F.3d 578 (8th Cir. 2004) 12

Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005) 14

Martin v. Gentile, 849 F.2d 863 (4th Cir. 1988) 22

Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003), cert. denied, 541 U.S. 1019 (2004) 15

Mollica v. Volker, 229 F.3d 366 (2nd Cir. 2000) 17

Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000) 22

Powers v. CSX Transp., Inc., 105 F. Supp. 2d 1295 (S.D. Ala. 2000) 16

Rodriguez v. Farrell, 280 F.3d 1341 (11th Cir. 2002) 21, 23

Saucier v. Katz, 533 U.S. 194 (2001) .....*passim*

Scott v. Harris, 127 S.Ct. 1769 (2007) 19

Shepard v. Ripperperger, 57 Fed.Appx. 270 (8th Cir. 2003) 10

Siegert v. Gilley, 500 U.S. 226 (1991) 18

Silverman v. Ballantine, 694 F.2d 1091 (7th Cir. 1982) 22

Smook v. Minnehaha Co., 475 F.3d 806 (8th Cir. 2006) 12

State Oil Co. v. Khan, 522 U.S. 3 (1997) 19

Wilson v. Layne, 526 U.S. 603 (1999) 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. IV ..... *passim*

28 U.S.C. § 1254 1

42 U.S.C. § 1983 ..... *passim*

OTHER AUTHORITIES

Leval, Judging under the Constitution: Dicta about Dicta, N.Y.U. L. Rev. 1249, 1278-1279 (2006) 16, 19

PETITION FOR A WRIT OF CERTIORARI

Clayton Edwards, in his individual capacity, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The now-vacated opinion of the three-judge panel of the Court of Appeals (App., *infra*, 11-25) is reported at 462 F.3d 802. The district court order denying qualified immunity (App., *infra*, 4-10) is not reported in F.Supp.2d (2005 WL 2176937). The order and judgment of the en banc court of appeals (App., *infra*, 1-3) is not reported. The order of the en banc court of appeals denying Petitioner's motion for rehearing, with dissenting opinion (App., *infra*, 26-38), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2007 (App. 3) and the order of the court of appeals denying Petitioner's timely motion for rehearing was entered on May 1, 2007. (App. 26-38). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by

> the Constitution and laws, shall be liable to the party injured . . .
>
> * * *

The Fourth Amendment to United States Constitution provides:

> The rights of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This case, like the recent case of *Brosseau v. Haugen*, 543 U.S. 194 (2004), presents a "clear misapprehension" of the qualified immunity standard. Review by this Court is plainly warranted to correct this misapprehension. *See* App. 38 (Beam and Riley, JJ., dissenting) (We "urge Officer Edwards to seek relief through Writ of Certiorari to the United States Supreme Court.").

In this case, the Eighth Circuit Court of Appeals, ruling en banc, affirmed the denial of the Petitioner's qualified immunity defense "by vote of an equally divided court." The Petitioner respectfully contends that an alleged constitutional right cannot be "clearly established" for purposes of qualified immunity where the jurisdictional court of appeals splits evenly on the question, particularly where, as here, this Court has never recognized the alleged right and the other courts of appeals have specifically disclaimed the right. In light of the relative clarity of the resolution of the second prong of the qualified immunity test (whether the alleged right was "clearly established"), announced by this Court in *Saucier v. Katz*, 533 U.S. 194 (2001), the Petitioner respectfully suggests that the Court abandon *Saucier*'s rigid two-step framework and grant the

Petitioner qualified immunity on *Saucier*'s second prong. Alternatively, even if the Court chooses not to overrule *Saucier*'s "order of battle," qualified immunity should still be granted as Respondent has not alleged or established a constitutional violation in the first place. Finally, the Petitioner respectfully and alternatively requests that this Court exercise its supervisory and rulemaking authority by holding that the "equally divided court rule" should operate to grant qualified immunity (rather than affirming the lower court) in interlocutory appeals of the denial of qualified immunity. For all of these reasons, the Petitioner respectfully requests the Court's review in this matter.

A. Background

On September 13, 2003, Petitioner Clayton Edwards, a White County, Arkansas Deputy Sheriff, responded to a report of an altercation at a demolition derby being held at the White County fairgrounds in Searcy, Arkansas. Edwards arrived to see an irritated Stephen Kenyon, Respondent's son, being restrained by a member of a large crowd that had gathered near the derby pits. Petitioner Edwards noticed that Stephen looked as though he had been in a fight. Edwards asked what was going on, and Stephen Kenyon replied, "He hit my mother." Edwards could tell Stephen was indicating that his mother was Shirley Cox, and so Edwards went over to her. Edwards described Cox's nose as being flat against her face, and that she was bleeding profusely from her nostrils. He noted that he was among a crowd of between one-hundred and two-hundred people, and described the environment as an "atmosphere of hostility" where weapons of opportunity, such as crowbars and hammers, were readily available. At first, Cox did not respond to Edwards' questions about what had happened because she was in pain. Edwards told Cox that an ambulance was on the way. Eventually, Cox told Edwards that it was David Kenyon who

had hit her. Edwards learned that David Kenyon was Cox's ex-husband, and realized he had a domestic battery situation on his hands. (App. 12).

After learning the identity of Cox's assailant, Petitioner Edwards addressed the crowd around him and asked if there were any witnesses to the events. He also asked where David Kenyon was. *Id.* No one answered at first, but then someone called out, "There he is." The crowd parted, leaving Kenyon in the middle. Edwards and the other officers on the scene approached Kenyon, and Edwards put his hand on Kenyon's elbow and asked his name. When Kenyon answered, Edwards told him he was under arrest (The Respondent conceded on appeal that Petitioner had probable cause to arrest him for the offenses of public intoxication and domestic battery under state law). Kenyon raised his arms in an inquiring gesture and asked, "For what?" Edwards then grabbed Kenyon's wrist and took his arm behind his back. Edwards then, according to Respondent, threw Kenyon onto the hood of a nearby car and pulled Kenyon's arms up high behind his back in order to handcuff him. According to Respondent, he told Edwards that he was hurting his arms, but Edwards persisted until Kenyon was handcuffed. Kenyon resisted because his arms were in pain from the handcuffing, and the officers told Kenyon to stop resisting. Kenyon claims he suffered a torn rotator cuff, requiring surgery, and continues to have pain. (App. 12).

B. Proceedings Below

1. Respondent filed his complaint in this action in February, 2004, in the United States District Court for the Eastern District of Arkansas, alleging, under 42 U.S.C. § 1983, that his Fourth Amendment rights were violated when he was allegedly arrested without probable cause and allegedly subjected to excessive force during the course of his arrest by four deputies of the White County,

Arkansas Sheriff's Department, including Petitioner Edwards. A jury trial was held in this case from January 24-27, 2005, and all of the Respondent's claims were dismissed by the jury as against all of the Defendants except for a single claim of excessive force against Petitioner Edwards, in his individual capacity, on which the jury deadlocked. Petitioner Edwards thereafter filed a motion for summary judgment on the remaining claim and asserted, *inter alia*, the affirmative defense of qualified immunity. After a response by the Respondent, the District Court issued an order denying the Petitioner's motion for summary judgment. (App. 4-10). In its Order denying the Petitioner's motion, the District Court held that "material questions of fact" precluded summary judgment in the Defendant-Appellant's favor. *Id.* The District Court did not identify the questions of fact to which it referred nor did it cite any facts that gave rise to the purported issue(s) of fact. Perhaps most importantly, the District Court did not make a determination as to whether Respondent's allegedly violated right was "clearly established" as a matter of law because, in the words of the District Court, "it is impossible to say because a material question of fact exists." (*Id.* at App. 9).

2. Subsequent to the District Court's denial of the Petitioner's summary judgment motion and qualified immunity defense, Petitioner filed an interlocutory appeal with the Eighth Circuit Court of Appeals challenging the denial of qualified immunity. After briefing and argument, the three-judge panel issued a ruling in Petitioner's favor, reversing the District Court and granting qualified immunity and summary judgment. (App. 11-25). *Kenyon v. Edwards*, 462 F.3d 802 (8th Cir. 2006), *vacated*. The panel held (1) that the Petitioner "did not use excessive force" in arresting and handcuffing the Respondent (App. 16) and (2) that, even assuming a constitutional violation, "the state of the law at the time of this incident was [not] such that it would be clear to a reasonable officer that

Edwards' conduct was unlawful in the situation he confronted at the derby." (App. 18, citation omitted). The Honorable Circuit Judge Smith dissented from the panel's decision and asserted that the majority had not given adequate deference to the facts alleged by the Respondent and that the case law established the right asserted by the Respondent.

3. Subsequent to the panel's decision in Petitioner's favor, Respondent requested and was granted rehearing en banc, including vacation of the panel opinion. After argument, the en banc Court of Appeals issued its Order in this case, which held as follows, in its entirety: "On rehearing en banc, the district court's judgment is affirmed by vote of an equally divided court." (App. 1-2, with Judgment at App. 3).

4. Subsequent to the Court of Appeals' en banc order, the Petitioner moved for rehearing en banc and/or by the panel. The Petitioner's motion for rehearing was summarily denied. (App. 26). The Honorable Circuit Judges Beam and Riley, however, issued a thirteen page dissenting opinion in which they opposed the "equally divided" en banc affirmance of the District Court's order because the District Court had improperly "(1) failed to rule on [Petitioner's] timely motion for qualified immunity and (2) made qualified immunity a question of fact." (App. 26-27). The Honorable dissenting Judges went on to note that "the opinion and order of district court, now affirmed by the ["equally divided"] en banc panel, answered neither of the two *Saucier* questions" for qualified immunity analysis. (App. 29). The Honorable dissenting Judges also found fault with the implied/applied holding of the "equally divided" affirmance of the District Court order: "[Petitioner] Edwards is not required to be a constitutional specialist as the en banc panel now seemingly holds." (App. 33). The Honorable dissenting Judges then expounded on the

inherent problems with denying qualified immunity in light of the procedural history of this case:

> [T]he jury, upon receiving Eighth Circuit Model Jury Instruction 3.04 on the elements of excessive force, acquitted three of the four police officers and could not agree upon Officer Edwards. On appeal before the three-judge panel, two of the three United States Circuit Judges found that no constitutional violation was made out by Kenyon and that a reasonably objective police officer would not have believed he or she was violating the Constitution. When the two issues were presented to the en banc panel of twelve judges, six found either no constitutional violation or, at least, that the contours of the right were not reasonably discernible to an objective police officer confronted by this same situation. To now require Officer Edwards to go through another jury trial under these circumstances is clearly contrary to the above-cited cases and abundant other binding precedent of this circuit carefully considered by the three-judge panel majority.

(App. 34).

Based on the reasoning set forth in their dissenting opinion, the Honorable dissenting Judges concluded by "urg[ing] Officer Edwards to seek relief through Writ of Certiorari to the United States Supreme Court." (App. 38).

REASONS FOR GRANTING THE PETITION

In 2004, in the case of *Brosseau v. Haugen*, 543 U.S. 194 (2004), this Court assumed jurisdiction of a section 1983 Fourth Amendment deadly force case in order to correct what it called a "clear misapprehension" of the qualified immunity standard by the Ninth Circuit Court of Appeals. The Petitioner respectfully contends that the Eighth Circuit Court of Appeals engaged in a similarly

"clear," albeit legally distinct, "misapprehension" of the qualified immunity standard in this case. At least two Circuit Judges of the United States Court of Appeals for the Eighth Circuit also believe that review by this Court is warranted in this case, as evinced by the conclusion of their dissent from the denial of Petitioner's motion for rehearing, where they "urge[d] Officer Edwards to seek relief through Writ of Certiorari to the United States Supreme Court." (App. 38).

In his Appeal Brief, Appellee David Kenyon summarized his argument in opposition to the Appellants' request for summary judgment: "The evidence before the Court on summary judgment when viewed in a light most favorable to the Appellee, shows that Defendant Edwards pulled the Appellee's arm back in a manner that he should not have." Appellee's Brief, p. 11. The Appellee goes on to say that his arm should have been brought back at a lower angle during handcuffing. *Id.* at 12. Since there is no clearly established law that defines the appropriate angle of a criminal suspect's arm during handcuffing, however, the Appellant is entitled to qualified immunity.

This Petition arises from an interlocutory appeal in the Eighth Circuit Court of Appeals from the denial of a qualified immunity in a 42 U.S.C. § 1983 case in the District Court for the Eastern District of Arkansas. The Petitioner seeks a Writ of Certiorari in this case so that this Court can review the en banc Order of the Eighth Circuit Court of Appeals, which held as follows, in its entirety: "On rehearing en banc, the district court's judgment [denying, inter alia, the Petitioner's request for qualified immunity] is affirmed by vote of an equally divided court."

I. A purported constitutional right cannot be "clearly established," for qualified immunity purposes, where the reviewing Circuit Court of Appeals, en banc, is "equally divided" on the question, this Court has never recognized the purported right, and the other Courts of Appeals which have considered the issue have specifically disclaimed the purported right.

In resolving questions of qualified immunity, this Court has set forth a two-pronged "order of battle" that must, under current precedent, be analyzed sequentially. First, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Id.*; *see also Brousseau v. Haugen*, 543 U.S. 194 (2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) ("[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). If either question is answered in the negative, qualified immunity should be awarded. *Id.*

The Petitioner respectfully contends that, regardless of the resolution of the first *Saucier* question, the second prong of the *Saucier* test (requiring that the alleged right be "clearly established" as a matter of law) is manifestly unsatisfied in the instant case and that the decision by the Eighth Circuit Court of Appeals in this case to affirm the denial of qualified immunity therefore stands in direct conflict with the binding precedents of this Court (and

with the decisions of several other Courts of Appeals applying said precedents). This contention is evinced most clearly by the fact that the Eighth Circuit Court of Appeals, ruling en banc, split evenly on the question of whether the right alleged by the Respondent – the purported right of a suspect, in the course of a valid arrest pursuant to probable cause, not to have his arms taken behind his back during handcuffing in a manner he deems "unnatural" – was "clearly established."

In light of the ruling by the Court of Appeals, the Petitioner respectfully asserts what frankly seems a rather obvious proposition: That a constitutional right cannot possibly be "clearly established," in either the common or legal sense of that term, where 12 Circuit Judges are "equally divided" on the question. In short, 6 of the 12 active Members of the Eighth Circuit Court of Appeals, with the full benefits of hindsight, studied reflection, a legal education, years of legal and judicial experience, a staff of law clerks and support personnel, and collegial discussion with 11 others sharing the same advantages, voted that the right is not "clearly established." This Court has clearly held that such a disagreement (in fact, a more distant disagreement, at least numerically) between judges mandates a grant of qualified immunity to the requesting police officer: "*If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.*" *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (emphasis added).[1]

[1] Notably, the Eighth Circuit has similarly recognized that open legal questions are not "clearly established law." *Shepard v. Ripperperger*, 57 Fed.Appx. 270, 272 (8th Cir. 2003).

In addition to the "equal division" of the en banc Court of Appeals on the question of clearly established law,[2] the favorable ruling by the three-judge panel that originally heard the case and found in favor of the Petitioner (later vacated when rehearing was granted) is also indicative of the unfounded, indeed unrecognized nature of the alleged right. *Kenyon v. Edwards*, 462 F.3d 802 (8th Cir. 2006), *vacated*.[3] The panel held that the Appellee had not established a constitutional violation and, even if he could establish such a violation, could not show that the right allegedly violated was "clearly established" as a matter of law. *Id.*

Finally, in addition to the "equal division" of the en banc Court of Appeals on the question of clearly established law and the favorable ruling of the original three-judge panel, the weight of precedent from other jurisdictions (and even from previous Eighth Circuit decisions) and lack of recognition by this Court dictates that, far from being "clearly established," the particularized right alleged by the Respondent has been specifically disclaimed in established law. *See* discussion on first prong of *Saucier* test, § III, *infra*.

The split of authority indirectly created by the Eighth Circuit's "equally divided" judgment in this case is critically

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[2] The Court of Appeals, en banc, never discussed the rationale for its decision, thus it is difficult for this Court to know precisely how the court of appeals came down on the first prong of the *Saucier* test (except that a majority did not answer the question of the existence of a constitutional violation in the negative), although presumably it came down equally divided, else it surely would have noted the difference. It is clear, however, that the Court or Appeals was "equally divided" on the second *Saucier* question regarding clearly established law.

[3] While vacated opinions carry no precedential weight, the Petitioner respectfully contends that the vacated panel opinion in this case is relevant and worthy of citation to the extent it impacts the question of the establishment and legal clarity of the Respondent's alleged right.

important as recent Supreme Court and Eighth Circuit qualified immunity jurisprudence has emphasized the requirement of precise notice and fair warning to the subject police officer that his conduct is unlawful at the time of the alleged conduct. *See Brosseau v. Haugen*, 543 U.S. 194 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, *reasonably misapprehends* the law governing the circumstances she confronted") (emphasis added); *see also Smook v. Minnehaha Co.*, 475 F.3d 806, 814 (8th Cir. 2006) (Police officer granted qualified immunity where his conduct was "within the *range* of objectively reasonable determinations that an official might have reached" about the conduct) (emphasis added); *Saucier v. Katz*, 533 U.S. 194 (2001) (Qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force; the qualified immunity inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition."); *Littrell v. Franklin*, 388 F.3d 578 (8th Cir. 2004). In the end, the dispositive inquiry is whether the subject officer could have or should have reasonably known that his conduct was unlawful at the time of the conduct:

> [T]here is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness, however, qualified immunity analysis requires that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer*

> *that his conduct was unlawful in the situation he confronted.*

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added, citations omitted).

In light of the equal division of the Court on the question of whether the Appellant violated the Appellee's clearly established constitutional rights (especially after a three-judge panel ruled in favor of granting qualified immunity to the Petitioner and in light of the specific repudiation of the alleged right by other jurisdictions), the Petitioner respectfully contends that there is no way he could have known that his conduct was unlawful when he acted. In short, where the Court of Appeals is still (years after the alleged conduct by the Petitioner) entirely uncertain as to whether the Petitioner's conduct violated a constitutional right and/or whether the alleged right was clearly established, it is fundamentally unfair and stands in direct conflict with the precedents of this Court and the underlying purpose for qualified immunity to expose a police officer's time, reputation, and personal assets to potential liability for "picking the losing side [or, in this case, at worst, the tying side] of the controversy."

II. The fixed "order of battle" announced in *Saucier v. Katz* should be reconsidered, overruled, and/or modified to the extent necessary to allow reviewing courts to consider the qualified immunity questions in the order that makes the most sense in the particular context of the case so that where, as here, the qualified immunity question is easily answered in the negative, the case can be readily dismissed on qualified immunity without unnecessary constitutional decisionmaking.

As discussed above, the second prong of the *Saucier* test is clearly unsatisfied in this case. In light of the

clearly negative answer to *Saucier*'s second qualified immunity question, this case provides an opportunity to reconsider the strict two-step framework mandated by *Saucier* for resolving qualified immunity claims, a framework that "a majority of the Justices have questioned in recent years." *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring). Requiring courts to decide whether a § 1983 plaintiff has stated a cognizable constitutional claim in every case before permitting analysis of whether such a claim was "clearly established" (1) imposes unnecessary burdens on courts and parties; (2) threatens to insulate many constitutional rulings from review on appeal; (3) requires courts to make constitutional pronouncements even where one or both parties have not argued the point thoroughly or the record is inadequate; and (4) is unnecessary to ensure the continued development of constitutional doctrine and, ironically, actually threatens to undermine this goal. Accordingly, the Petitioner respectfully urges the Court to abandon *Saucier*'s mandatory two-step approach to qualified immunity claims.

On its own, this established principle of judicial restraint counsels in favor of permitting courts the flexibility to resolve qualified immunity cases without first reaching the merits of the constitutional question. *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring) ("[W]hen . . . [the constitutional] question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."); *see also, e.g., Kalka v. Hawk*, 215 F.3d 90, 97 (D.C. Cir. 2000) (Criticizing mandatory two-step approach in part because it offends principle that "[f]ederal courts should not decide constitutional questions unless it is necessary to do so"). The practical side of this argument is that judicial restraint is usually equivalent to judicial economy: "[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense."

Brosseau v. Haugen, 543 U.S. 194, 201-202 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring); *see also, e.g., DiMeglio v. Haines*, 45 F.3d 790, 799 (4th Cir. 1995) ("[C]ourts should be free to decide the case on the most expedient ground").

Saucier's rigid and sequential two-step framework not only requires courts to make unnecessary constitutional holdings, but also insulates many such holdings from further review. *See Brosseau v. Haugen*, 543 U.S. 194, 202 (2004) (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring) (Observing that two-step rule "can sometimes lead to a constitutional decision that is effectively insulated from review"). This occurs when a court holds that the defendant's conduct violated a cognizable constitutional right, but proceeds to grant judgment to the defendant because that right was not clearly established. *See Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), cert. denied, 541 U.S. 1019 (2004) (Dissenting from the denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making" that arose from the Court's "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, which insulated from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings). The insulation of constitutional holdings from further review is unfair to all government officials and employees as an unreviewable constitutional holding announced by a court of appeals under *Saucier*'s first prong may in the future be held to have "clearly established" the constitutional standards with which state and local officials must comply.

Saucier also requires defense counsel to advance potentially complex constitutional arguments on the first *Saucier* prong, even where counsel is sure of winning the case on the second prong. Adding to governmental defendants' expense (and indirectly to taxpayer expense) in this

way undermines the very purpose behind the qualified immunity doctrine – to shield official defendants from "the burdens of litigation." *Brosseau*, 543 U.S. at 198; *see also DiMeglio*, 45 F.3d at 798. Experience dictates that some parties, for rational and/or pecuniary reasons, choose to devote little time and effort to the constitutional issue presented in step one. *See, e.g., African Trade and Info. Ctr. v. Abromaitis*, 294 F.3d 355, 359 (2nd Cir. 2002) (Skipping to second step of analysis because, *inter alia*, "the merits of [the constitutional] issue [were] scarcely mentioned in the briefs on appeal, let alone adequately briefed"); *Powers v. CSX Transp., Inc.*, 105 F. Supp. 2d 1295, 1308 (S.D. Ala. 2000) (Citing, among reasons for skipping first step, fact that "the parties' briefing on the constitutional and statutory issues is not merely poor but essentially non-existent," which may be the product of the parties' "enlightened self-interest").

For courts, too, the fact that a constitutional question has no impact on a case's outcome may detract from the quality of its decisionmaking. *See, e.g., Horne v. Coughlin*, 191 F.3d 244, 247 (2nd Cir. 1999) ("[J]udges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication."). As Judge Leval recently explained in concluding that "*Saucier* is a blueprint for the creation of bad constitutional law":

> [T]he fact is, in many cases neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case. The court's conclusion on this question will come at no price.

Leval, Judging under the Constitution: Dicta about Dicta, N.Y.U. L. Rev. 1249, 1278-1279 (2006) (footnotes omitted).

Compounding these problems is the fact that *Saucier* compels courts to make constitutional decisions on an

inadequate record. Settled precedent encourages defendants to raise qualified immunity early in litigation, including on a motion to dismiss, for "the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery." *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (internal quotation marks omitted); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). Yet raising the defense early can force courts to render highly abstract constitutional decisions "on a nonexistent factual record, even where . . . discovery would readily reveal the plaintiff's claims to be factually baseless." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). A government official's decision to assert qualified immunity early in the litigation therefore may result in "the development of legal doctrine that has lost its moorings in the empirical world; and that might never need to be determined were the case permitted to proceed." *Ibid.* As the Second Circuit noted in one such case:

> Given the scant record before us (as is common in appeals from summary judgment based on qualified immunity), we are faced with three possible courses of action: (1) reach out on an inadequate record to announce a view, in dictum, on a constitutional question whose resolution is unnecessary to decide the case, (2) remand to the district court and direct the district court to require the parties to participate in further proceedings that will have no bearing on the result of their case, or (3) decline to express a view on the underlying constitutional question since we lack adequate information to do so. We think it clear that the third option is the preferable one.

Mollica v. Volker, 229 F.3d 366, 374 (2nd Cir. 2000).

In sum, *Saucier* not only requires courts to abandon traditional notions of restraint and resolve constitutional

questions unnecessarily, but often does so under unfavorable conditions, without adequate argument from one or both parties, without an adequate record, or without the benefit of appellate review. The Court justified its departure from the usual practice of avoiding non-essential constitutional rulings because "if the policy of avoidance were always followed in favor of ruling on qualified immunity . . . , standards of official conduct would tend to remain uncertain." *Lewis*, 523 U.S. at 841, n. 5; *see also Saucier*, 533 U.S. at 201 ("[T]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."). But assuring the law's development does not require courts to make constitutional pronouncements in every case; it merely counsels against prohibiting courts from doing so. Abandoning *Saucier*'s mandatory, two-step "order of battle" does not mean categorically forbidding courts from deciding whether § 1983 plaintiffs have alleged, cognizable constitutional rights. In many cases, deciding the constitutional question first will be the preferred course. "The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Ibid.* And "[A]ddressing a more concrete issue (was there a constitutional violation?) before turning to a more abstract issue (was it clearly established?) will generally present an easier mode of analysis than approaching matters the other way around." *Id.* at 583.

Introducing this flexibility would permit courts to resolve cases solely on the second, "clearly established" step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so. *See Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring) ("[T]he Court of Appeals adopted the altogether normal

procedure of deciding the case before it on the ground that appeared to officer the most direct and appropriate resolution, and one argued by the parties."). Constitutional law does not depend for its development on cases where the defendant may seek qualified immunity. Constitutional issues arise in innumerable cases where there is no qualified immunity, such as criminal cases where the defendant seeks to suppress evidence, § 1983 cases against a municipality, or § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. *See, e.g.*, Leval, *supra*, at 1280-1281 (Even without *Saucier*'s rule, repeated conduct is "not likely to repeatedly escape review," for good faith immunity "does not apply, for example, where an injunction is sought to prevent repetition of the conduct, . . . where the suit is against a municipality based on municipal policy," or "where suppression of evidence is sought").

Although the Court "approach[es] the reconsideration of [its] decisions . . . with the utmost caution," "[s]tare decisis is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule, the existing rule does not achieve its own aim and causes a host of collateral problems, and the precedent has been criticized by several Members of this Court, unevenly applied by the Court, and narrowed and even disregarded by the courts of appeals. *Scott v. Harris*, 127 S.Ct. 1769, 1781 (2007) (Breyer, J., concurring) ("[W]hile this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here" . . . "The order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.").

In the end, *Saucier*'s rigid, two-step framework for qualified immunity claims has had unforeseen, adverse

collateral consequences, is unnecessary to advance the goal put forth as its justification, and in fact undermines that goal to a certain extent. Accordingly, the Petitioner respectfully requests that the Court abandon the rule as a requirement for use in every qualified immunity case and grant the Petitioner qualified immunity on the second prong of the *Saucier* test.

III. The act of taking a suspect's arms behind his back to handcuff him, incident to a valid arrest based upon probable cause, does not violate the suspect's Fourth Amendment rights, regardless of allegations that the officer took the suspect's arms back in an "unnatural," "high," or even "painful" manner and regardless of whether the suspect suffered injury.

If the Court analyzes the Petitioner's qualified immunity defense pursuant to the current analytical framework outline in *Saucier*, the Court must decide whether the Petitioner's action in this case – taking the Respondent's arm behind his back in order to handcuff him, allegedly in an "unnatural" manner where Respondent's arm was raised too high – violated the Respondent's Fourth Amendment rights. By affirming the District Court's denial of qualified immunity in this case, the Eighth Circuit Court of Appeals effectively, albeit implicitly, held that the act of taking the Respondent's arms behind his back to handcuff him constituted such a violation (or, more accurately, that genuine issues of material fact existed with regard to the question). This ruling by the Eighth Circuit Court of Appeals creates a distinct split in the circuits since the other courts of appeals have held that the act of taking a suspect's arms behind his back to handcuff him (as opposed to "tight" handcuffing) does not violate the suspect's Fourth Amendment rights, even where the arms are taken back in an "unnatural," "high," or even "painful" manner.

This line of cases is perhaps best represented by the 2002 case of *Rodriguez v. Farrell*, 280 F.3d 1341, 1351-1353 (11th Cir. 2002), in which the Eleventh Circuit Court of Appeals took up a case with allegations that were strikingly similar to the instant case. The Eleventh Circuit held as follows, in pertinent part:

> *The evidence, in the light most favorable to plaintiff, shows that Sgt. Farrell grabbed plaintiff's arm, twisted it around plaintiff's back, jerking it up high to the shoulder and then handcuffed plaintiff as plaintiff fell to his knees screaming that Farrell was hurting him.* Plaintiff was placed in the rear of Sgt. Farrell's patrol car, kept handcuffed behind his back and transported to the police station. The handcuffs were removed minutes after arrival at the police department. *The handcuffing technique used by Sgt. Farrell is a relatively common and ordinarily accepted non-excessive way to detain an arrestee.*
>
> Plaintiff's orthopedic surgeon testified that the handcuffing was a "very serious, painful event," that resulted in the loosening of the internal surgical hardware, and caused the displacement of a key bone fragment. *The resulting complications included more than twenty-five subsequent surgeries and ultimately amputation of the arm below the elbow.*[FN19].
>
> > FN19. Given the loss of an arm, we are presented with the proverbial "hard case," that is, one in which one's natural sympathies are aroused by the plaintiff's plight. We recall Justice Jackson's warning to judges: "We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S.Ct. 213, 216, 91 L.Ed. 204 (1946).

Painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal. See Nolin, 207 F.3d at 1257-58 (concluding, as a matter of law, that force used during arrest, including handcuffing, was not excessive when force and resulting injury were minimal); *Brissett v. Paul*, 141 F.3d 1157 (4th Cir.1998) (table) (concluding, as matter of law, that painful handcuffing with minimal injury not constitutional violation); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir.1990) (same); *see also Martin v. Gentile*, 849 F.2d 863, 869-70 (4th Cir.1988) (concluding that force used, as a matter of law, was not excessive); *Silverman v. Ballantine*, 694 F.2d 1091, 1096-97 (7th Cir.1982) (same).

This case is different from Nolin because Rodriguez's earlier surgery made what otherwise would be a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results. This distinction, however, is not important legally and does not preclude a conclusion that Rodriguez has shown no constitutional violation: no evidence has been presented that Sgt. Farrell knew of plaintiff's recent elbow surgery or, more important, knew that handcuffing plaintiff would seriously aggravate plaintiff's preexisting condition. [FN 20 omitted] We do not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act. *What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time. See Silverman*, 694 F.2d at 1096-97 *(concluding that force used was not, as a matter of law, excessive even though arrestee died of heart attack during arrest).* Under the

> circumstances of this case, Sgt. Farrell's acts cannot rise to the level of a constitutional violation.

Rodriguez v. Farrell, 280 F.3d 1341, 1351-1353 (11th Cir. 2002) (emphases added).

Other cases that have held that taking an arrestee's arms behind his back to handcuff him during a valid arrest, even where the arrestee alleges and proves that such action is taken in a forceful or even painful manner, does not constitute excessive force. *See, e.g., Brissett v. Paul*, 141 F.3d 1157 (4th Cir. 1998) (No constitutional violation despite arrestee's allegations of the handcuffing officer "holding his arms in such a way as to inflict pain"); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-922 (9th Cir. 2001) (Twisting the plaintiff's left arm behind her with enough force to lift her off the ground and breaking her watch band while attempting to handcuff did not violate Fourth Amendment right where the plaintiff refused to show transit identification).

The en banc Court of Appeals did not discuss its rationale for (indirectly) denying qualified immunity in this case with regard to either prong of the *Saucier* test. The dissenting Judge in the vacated panel opinion, however, did cite several cases that purportedly stood for the proposition that "excessive force in handcuffing was clearly established" at the time of the Respondent's arrest by Petitioner. (App. 24-25). These cases, however, fail to "clearly establish" the right Plaintiff alleges in this case and reveal the reason why, as a practical matter, there can be no constitutional liability for taking an arrestee's arms behind his back at any angle. Principally, the cases cited by the Honorable dissenting Judge on the panel (presumably the same cases relied upon by the Court of Appeals en banc to deny qualified immunity to the Petitioner) are so fundamentally dissimilar to the instant case as a factual matter (or state a proposition so broad (*e.g*,

excessive force is prohibited by the Constitution)) that they could not have given the Petitioner fair notice of the purported unlawfulness of his conduct. (App. 17-19).

To the extent that the cases cited by the Honorable dissenting Judge on the panel are remotely similar to the allegations in the instant cases, they are still inapposite for qualified immunity purposes because they stand only for the proposition that, in certain circumstances involving extreme indifference to known pain and/or injury, excessively "tight" handcuffing can sometimes give rise to constitutional liability. *But see, e.g., Crumley v. City of St. Paul, Minn.*, 324 F.3d 1003, 1008 (8th Cir. 2003) (Tight and forceful handcuffing of a suspect does not amount to excessive force); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (Summary judgment in officer's favor affirmed where the Court held that a claim of nerve damage resulting from being handcuffed too tightly was not tantamount to excessive force); *Braun v. Baldwin*, 346 F.3d 761, 763 (7th Cir. 2003) (Affirming, *inter alia*, grant of summary judgment for defendants on excessive use of force claim based on tight handcuffing); *Burchett v. Kiefer*, 310 F.3d 937, 944-45 (6th Cir. 2002) (Summary judgment for officers on excessive force claim affirmed because officers removed the handcuffs once plaintiff complained they were too tight); *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (Declaring that "handcuffing too tightly, without more, does not amount to excessive force"); *Carter v. Morris*, 164 F.3d 215, 219 n. 3 (4th Cir. 1999) (Finding that plaintiff's allegation that she was handcuffed too tightly was "so insubstantial that it cannot as a matter of law support her claim" of excessive force). *Greiner v. City of Champlin*, 27 F.3d 1346 (8th Cir. 1994).

The "tight" handcuffing line of cases cited by the Honorable dissenting Judge on the panel, and presumably relied upon by the en banc court of appeals, are insufficient to deny qualified immunity to the Petitioner because

they do not relate to the Respondent's allegations in this case whatsoever. In other words, there is no way the Petitioner could have received "fair notice" (in the qualified immunity sense) that he was acting unlawfully when he allegedly took the Respondent's arms behind his back in an "unnatural" manner by virtue of cases that, at most, ambiguously prohibit the excessively "tight" application of handcuffs to a suspect's wrists. Instead, this Court has repeatedly and expressly required more particularized and clear notice that would give an officer fair notice that his conduct was unlawful (at the time of the conduct). *See Saucier v. Katz*, 533 U.S. 194 (2001) (Qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force." The qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("'[T]here is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness,' however, qualified immunity analysis requires that 'the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"); *but see Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (Where an Eighth Amendment violation was "obvious," there need not be a "fundamentally similar" case for the right to be clearly established).

In addition to the need for "particularized" and "sufficiently clear" parameters defining the right and/or duty allegedly violated (which do not exist with regard to the

question of the appropriate angle of a suspect's arm during handcuffing, *see infra*), the Supreme Court has routinely held that mistakes in judgment by law enforcement officers, especially in the "hazy border between excessive and acceptable force," entitle the officer to the protection of qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194 (2004) ("[Q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted"); *Saucier v. Katz*, 533 U.S. 194, 204-207 (2001) ("[I]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense. Qualified immunity operates . . . to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution").

In this case, the Respondent asserts that his arm should have been brought back at a lower angle during handcuffing by the Petitioner, as opposed to the allegedly "unnatural" angle purportedly utilized. The Respondent has cited no law in his appellate briefings, the Honorable dissenting Judge has cited no law, and undersigned counsel has found no law imposing Fourth Amendment liability (or even denying qualified immunity, other than this case) based upon the angle of a suspect's arm during handcuffing attendant to a valid arrest. This does not end the inquiry on the first prong of *Saucier*, however, it

merely exposes the split in the circuits created by the Eighth Circuit's implied/applied ruling in this case.

With regard to the question of whether the Petitioner's conduct (as alleged by the Respondent per the standard for summary judgment), the Petitioner respectfully suggests that this Court should join the other circuits that have refused to impose Fourth Amendment liability under the theory advanced by Respondent in this case (*i.e.*, improper arm angle). In addition to the rationale set forth in those cases (*see supra*), the Petitioner respectfully suggests that practical considerations also call for this Court to join the other circuits that have refused to impose Fourth Amendment liability under Respondent's theory. First, allowing for Fourth Amendment liability where an officer allegedly took a suspect's arms behind his back at an angle the suspect found objectionable (whether styled as "unnatural," "unorthodox," "high," or otherwise improper handcuffing, the allegation is, in reality, that the officer negligently handcuffed) would inevitably lead to a flood of litigation as experience and common sense dictate that most suspects would so object. Even were the Court to attempt to fashion an appropriate standard for taking a suspect's arms behind his back, it seems hard to imagine any workable "bright lines" being drawn with regard to the angle of a suspect's arm during handcuffing (*i.e.*, how "high" is too high?). Similarly, where objective, standards and proof are easily determined in "tight" handcuffing case (was cuff digging into skin, were lacerations immediately created during the handcuffing, were wrists swelling, etc.), the standards and proof in "arm angle" cases would be entirely subjective and speculative (unless a bystander had a protractor handy). Finally, allowing for liability where the suspect suffers injury would essentially eviscerate qualified immunity in this context as the officer would never know whether his conduct was unlawful until injury and/or severity of injury was diagnosed after the fact. For all these reasons, the Petitioner respectfully requests that

this Court join the other circuits that have refused to impose Fourth Amendment liability under the theory advanced by Respondent in this case.

IV. The "equally divided court rule," which calls for affirmance of the trial court where the vote of an appellate court is evenly split, is not appropriate in the context of an interlocutory appeal of the denial of a public official's qualified immunity; rather, an equally divided appellate court vote should result in a grant of qualified immunity to the defending public official.

In light of the procedural posture of this matter at the time of the ruling by the court of appeals, Petitioner respectfully requests that this Court exercise its supervising and rulemaking authority by holding that "the vote of an equally divided Court" in this case should have resulted in a grant of the Petitioner's request for qualified immunity rather than an affirmance of the district court. The qualified immunity precedents of this court dictate that qualified immunity should be granted where the applicable law and/or standard is less than clearly established. It is hard to imagine how applicable law on a particular topic in a particular circuit could be less clear than when the Judges of that Circuit completely and uniformly disagree on the issue.

The interlocutory nature of this appeal should also provide for a distinction from the standard appeal. In the normal appeal, a final order is challenged by the appellant and the sole issue before this Court is whether the District Court erred in some procedural or substantive particular(s). In such a case, if this Court is "equally divided" en banc, the benefit of the doubt is appropriately given to the trial judge, by virtue of the "equally divided court rule," in recognition of the general deference to the trial judge's discretion, the proximity of the trial judge to the factual

determinations, and other long-standing principles of judicial deference. In an interlocutory appeal challenging a collateral order, particularly one challenging the denial of qualified immunity, however, the Petitioner respectfully contends (and submits that the precedents of this Court require) that the benefit of the doubt must be given to the subject police officer rather than the trial judge. This Court, for instance, has routinely held that mistakes in judgment by law enforcement officers, especially in the "hazy border between excessive and acceptable force," entitle the officer to the protection of qualified immunity:

> *It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.* An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. *If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.* Qualified immunity operates . . . to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution.

Saucier v. Katz, 533 U.S. 194, 204-207 (2001).

In light of the unique procedural context of this case – an equally divided Court en banc – it is certainly not a stretch to contend that any mistake by the Petitioner (if agreement with exactly half of the Members of the Eighth Circuit Court of Appeals can actually be regarded as a legal "mistake") was reasonable and that the Petitioner is therefore entitled to qualified immunity.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3487

David Kenyon, Plaintiff/Appellee, v. Clayton Edwards, individually, Defendant/Appellant, Lt. Jim Hale, individually; Jeremiah Ervin, individually; Dan Jarry, individually, originally sued as "Van Jarry," Defendants.	*	Appeal from the United States District Court for the Eastern District of Arkansas. [PUBLISHED]

Filed: January 18, 2007

Before LOKEN, Chief Judge, WOLLMAN, BEAM, MURPHY, BYE, RILEY, MELLOY, SMITH, COLLOTON, GRUENDER, BENTON and SHEPHERD, Circuit Judges, *en banc*.

ORDER

On rehearing en banc, the district court's judgment is affirmed by vote of an equally divided court.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 05-3487

David Kenyon,

Appellee

v.

Clayton Edwards, individually,

Appellant

and

Lt. Jim Hale, Individually, et al.,

Appeal from U.S. District Court
for the Eastern District of Arkansas – Little Rock
(4:04-cv-00131-HDY)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the order of this Court.

January 18, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DAVID KENYON — PLAINTIFF

v. NO. 4:04CV00131 HDY

CLAYTON EDWARDS, Individually; LT. JIM HALE, Individually; JEREMIAH ERVIN, Individually; and DAN JARRY, Individually — DEFENDANTS

ORDER

(Filed Aug. 31, 2005)

FACTS. On September 13, 2003, plaintiff David Kenyon ("Kenyon") attended a demolition derby at the White County, Arkansas, Fairgrounds in Searcy, Arkansas. While he was attending the demolition derby, he was arrested, allegedly without justification, for domestic battery in the third degree and public intoxication by, among others, defendant Clayton Edwards ("Edwards"), a White County, Arkansas, deputy sheriff. Although Kenyon allegedly "did not resist arrest or physically threaten the [officers], *see* Document 1 at 2, he was allegedly injured during the course of the arrest. It appears from the record that he was later acquitted of domestic battery in the third degree and had the public intoxication charge against him dismissed.

COMPLAINT. Kenyon began this proceeding in February of 2004 by filing a complaint pursuant to 42 U.S.C. 1983 and joining, among others, Edwards. Kenyon alleged, *inter alia*, that during the course of his arrest, "Edwards . . . , using unnecessary and excessive force,

caused injury to [Kenyon], including but not limited to a torn rotor cuff in his left shoulder, contusions to his right knee, contusions to his neck, severe bruising to his left arm, and other contusions about his body." *See* Document 1 at 2.

TRIAL. This proceeding was tried to jury beginning on January 24, 2005. On the third day of trial, the jury retired to begin deliberating its verdict. The following day, the foreperson of the jury reported that the jury had reached a unanimous verdict on both counts and all defendants, save Kenyon's claim of excessive force against one of the four defendants. Court was then reconvened, and the jury's verdict was read in open court. The verdict provided the following:

(1) with respect to Kenyon's claim of false arrest, the jury found for all of the defendants;

(2) with respect to his claim of excessive force, the jury found for all of the defendants, save Edwards; and

(3) with respect to Kenyon's claim of excessive force against Edwards, the jury was unable to reach a verdict.

In accordance with the verdict announced by the jury, the Court ordered the following:

(A) Kenyon's claim of false arrest against all of the defendants was dismissed, although a judgment was not entered at that time;

(B) His claim of excessive force against three of the defendants was also dismissed;

(C) The three defendants exonerated by the jury's findings were dismissed from this proceeding, although a judgment dismissing them was not entered at that time.

(D) A mistrial was declared on Kenyon's claim of excessive force against Edwards.

POST-TRIAL PROCEEDINGS. Immediately after declaring a mistrial, the Court began the process of scheduling a new trial on Kenyon's claim of excessive force against Edwards. The new trial was eventually scheduled for the week beginning September 12, 2005. The Court additionally established several deadlines, two of which were a deadline for filing pre-trial motions, that being, July 14, 2005, and a deadline for the completion of discovery, that being, July 18, 2005.

The parties thereafter requested, and received, an extension of the motions and discovery deadlines. The parties were given up to, and including, August 15, 2005, to file all pre-trial motions and complete discovery.

On August 15, 2005, Kenyon filed the pending motions in limine. See Documents 33 and 35. On the same day, Edwards filed the pending motion for summary judgment. *See* Document 37. Kenyon has now submitted a response to Edwards' motion for summary judgment, and the Court is prepared to address the motion.

MOTION FOR SUMMARY JUDGMENT.[1] Edwards maintains that Kenyon's claim of excessive force should be dismissed. Edwards specifically maintains the following:

> Plaintiff's excessive force claim . . . should be summarily dismissed because Plaintiff (1) can offer no proof of an objective law enforcement standard that was violated by . . . Edwards and (2) can offer no proof to show that . . . Edwards' conduct was unreasonable under any standard.
>
> Plaintiff's claims for compensatory and punitive damages should be summarily dismissed because Plaintiff cannot establish the casual link necessary to recover compensatory damages and cannot establish the level of willful misconduct necessary to recover punitive damages.
>
> Plaintiff cannot offer any proof to show that . . . Edwards violated any clearly established law and [Edwards] is therefore entitled to summary judgment as a matter of taw.

See Document 37 at 1. For the reasons that follow, Edward's motion is denied.

Edwards first maintains that Kenyon can offer no proof that an objective law enforcement standard was violated nor can he offer any proof to show that Edwards' conduct was unreasonable under any standard. The Court disagrees. There is a material question of fact whether the

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[1] "Summary Judgment is proper only where there is not genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *See Blair v. Wills*, 2005 WL 2036240 (8th Cir. 2005).

force employed by Edwards was objectively reasonable under the particular circumstances.[2]

Edwards next maintains that Kenyon's claims for compensatory and punitive damages should be summarily dismissed because he cannot establish the casual link necessary to recover compensatory damages and cannot establish the level of willful misconduct necessary to recover punitive damages. With respect to Edward's assertion regarding Kenyon's claim for compensatory damages, the Court disagrees. There is a material question of fact concerning the cause of Kenyon's rotor cuff injury. The evidence linking Edwards' conduct to Kenyon's injury is admittedly not particularly strong, but it is enough to survive Edwards' summary judgment motion.

With respect to Edwards' assertion regarding Kenyon's claim for punitive damages, the Court did not submit the issue of punitive damages to the jury in the first trial. The Court anticipates doing likewise in the second trial but will reserve a final ruling on that issue until the close of all the evidence.

Edwards next maintains that he is shielded from liability by qualified immunity. The prevailing law on that issue is clear. He is shielded by qualified immunity unless he violated a clearly established right of which a reasonable person would have known. *See Walker v. City of Pine*

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[2] Edwards represents, and the Court accepts, that "[t]he force employed by an officer is not excessive and, thus, not violative of the Fourth Amendment if it was 'objectively reasonable under the particular circumstances.'" *See* Document 38 at 2 [quoting *Greiner v. City of Champlin*, 27 F.3d 1346, 1354 (8th Cir. 1994)].

Bluff, 414 F.3d 989 (8th Cir. 2005).[3] Qualified immunity issues are oftentimes analyzed using a two step procedure. The two steps are as follows:

> First, [the court asks] whether the facts as asserted by the plaintiff "show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If the answer is no, [the court grants] qualified immunity. If the answer is yes, [the court goes] on to determine "whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

See Wright v. Rolette County, 2005 WL 1862343 at 2 (8th Cir. 2005). The facts as asserted by Kenyon, *i.e*, Edwards used excessive force in arresting Kenyon, show that Edwards' conduct violated a constitutional right.[4] Could a reasonable officer believe that Edwards' conduct was lawful in light of clearly established law? At this juncture of the proceeding, it is impossible to say because a material question of fact exists.

On the basis of the foregoing, the Court finds that material questions of fact exist. Edwards' motion for summary judgment is therefore denied. With respect to

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[3] "'The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'" *See Id.* at 992 [quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

[4] The Court accepts Kenyon's assertion as true solely for purposes of this order. It is not accepted as true for any other purpose.

Kenyon's claim for punitive damages, the Court will reserve a final ruling on that issue until the close of all the evidence.

MOTIONS IN LIMINE. As the Court noted above, Kenyon has filed separate motions in limine. The Court will address those motions in a separate order to be issued in the coming days.

IT IS SO ORDERED this 31 day of August, 2005.

/s/ H Daniel Young
UNITED STATES
MAGISTRATE JUDGE

462 F.3d 802

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3487

David Kenyon, Plaintiff/Appellee, v. Clayton Edwards, individually, Defendant/Appellant, Lt. Jim Hale, individually; Jeremiah Ervin, individually; Dan Jarry, individually, originally sued as "Van Jarry," Defendants.	* * * * * * * * * * * * *	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 11, 2006
Filed: September 7, 2006

Before RILEY, BEAM, and SMITH, Circuit Judges.

BEAM, Circuit Judge.

Clayton Edwards, a deputy sheriff for White County, Arkansas, brings this interlocutory appeal of the district court's denial of his motion for summary judgment based on qualified immunity. David Kenyon (Kenyon) sued

Edwards and three White County deputy sheriffs: Lieutenant Jim Hale, Sheriff Jeremiah Ervin, and Sheriff Dan Jarry.

I. BACKGROUND

We recount the facts in the light most favorable to Kenyon, the party asserting the injury in this qualified immunity case. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). On September 13, 2003, Edwards responded to a report of an altercation at a demolition derby being held at the White County fairgrounds in Searcy, Arkansas. Edwards arrived to see an irritated Stephen Kenyon being restrained by a member of a large crowd that had gathered near the derby pits. Edwards noticed that Stephen looked as though he had been in a fight. Edwards asked what was going on, and Stephen replied, "He hit my mother." Edwards could tell Stephen was indicating that his mother was Shirley Cox, and so Edwards went over to her. Edwards described Cox's nose as being flat against her face, and that she was bleeding profusely from her nostrils. He noted that he was among a crowd of between one-hundred and two-hundred people, and described the environment as an "atmosphere of hostility" where weapons of opportunity, such as crowbars and hammers, were readily available. At first, Cox did not respond to Edwards' questions about what had happened because she was in pain. Edwards told Cox that an ambulance was on the way. Eventually, Cox told Edwards that it was David Kenyon who had hit her. Edwards learned that David Kenyon was Cox's ex-husband, and realized he had a domestic battery situation on his hands.

Edwards addressed the crowd around him and asked if there were any witnesses to the events. He also asked where David Kenyon was. No one answered at first, but then someone called out, "There he is." The crowd parted, leaving Kenyon in the middle. Edwards and the other officers on the scene approached Kenyon, and Edwards put his hand on Kenyon's elbow and asked his name. When Kenyon answered, Edwards told him he was under arrest.[1] Kenyon raised his arms in an inquiring gesture and asked, "For what?" Edwards then grabbed Kenyon's wrist and took his arm behind his back. Though precisely what happened next is in dispute, we must, as we have said, credit Kenyon's version of the facts for purposes of the qualified immunity analysis. Under that version, Edwards threw Kenyon onto the hood of a nearby car and pulled Kenyon's arms up high behind his back in order to handcuff him. Kenyon told Edwards that he was hurting his arms, but Edwards persisted until Kenyon was handcuffed. Kenyon resisted because his arms were in pain from the handcuffing, and the officers told Kenyon to stop resisting. Kenyon claims he suffered a torn rotator cuff, requiring surgery, and continues to have pain.

Kenyon's suit against the four police officers ended with a jury finding in favor of the officers, save Edwards. The jury was unable to reach a verdict on the excessive force claim against Edwards, and the court declared a mistrial. After the court scheduled a new trial, Edwards moved for summary judgment based in part on qualified immunity. The district court accepted Kenyon's version of

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[1] The record indicates that Kenyon admitted that Edwards had probable cause to arrest Kenyon for both domestic battery and public intoxication.

the facts as true for purposes of qualified immunity, and found that on those facts, Edwards' actions violated Kenyon's constitutional rights. But the court said it was impossible at the summary judgment stage to answer whether it would be clear to a reasonable officer that Edwards' conduct was unlawful in the situation he faced – that is, whether the constitutional right at issue was clearly established – because it found that a material question of fact remained. The court did not explain at that point what fact remained in dispute, but elsewhere in its opinion, the court stated a material question of fact remained as to whether the force Edwards used was objectively reasonable under the circumstances.

II. DISCUSSION

A district court's order denying summary judgment is generally not appealable. *Henderson v. Munn,* 439 F.3d 497, 501 (8th Cir. 2006). However, this court has limited authority to review the denial of summary judgment based on qualified immunity to the extent the appellant seeks review of purely legal determinations. *Id.* Edwards does not seek review of any factual determinations, but argues, in essence, that Kenyon has failed to show that Edwards used excessive force in his arrest, and that even if Edwards did, Kenyon's right to be free from such force under these circumstances was not clearly established. We find that Edwards is entitled to summary judgment based on qualified immunity.

A. The Qualified Immunity Analysis

Saucier provides the marching orders for courts considering qualified immunity claims. Under *Saucier,*

courts presented with a motion for summary judgment on the basis of qualified immunity undertake a two-step inquiry. The threshold question asks "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201. If, on the facts as alleged, no constitutional violation could be shown were the allegations established, the inquiry ends, and the defendant is entitled to qualified immunity. "On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* The second question must be asked in a "particularized" sense: "'[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). That is, the essential question at step two is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

B. No Constitutional Violation

Edwards first argues that because Kenyon has failed to point to the violation of an "objective law enforcement standard" during the arrest, Kenyon has failed to show that reasonable officers would disagree on the proper course of action in the situation. Thus, Edwards says, there is nothing for a jury to decide. This somewhat convoluted argument challenges the district court's finding that the facts as alleged by Kenyon show that Edwards used excessive force during the arrest, violating Kenyon's Fourth Amendment right to be free from unreasonable seizure.

Excessive force claims are analyzed under the Fourth Amendment's reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 394 (1989). In determining whether the amount of force used is reasonable, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotations and citation omitted). This analysis requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Finally, judges must allow for the fact that police officers often make split-second decisions about the amount of force necessary in tense, uncertain, and rapidly changing circumstances. *Id.* at 396-97.

Taking the facts as alleged by and in the light most favorable to Kenyon, Edwards threw Kenyon onto the hood of a car and pulled his arms up high behind his back in an "unnatural" manner in an attempt to arrest and handcuff Kenyon for domestic battery and public intoxication. Kenyon kept asking why he was being arrested, as he continued to resist, albeit because of the pain from the handcuffing. The encounter took place amidst a large crowd of people in an atmosphere of hostility where weapons of opportunity were available. Based on all of the factors in *Graham,* Edwards did not use excessive force. Though the encounter apparently resulted in injury to Kenyon's rotator cuff, we believe under the circumstances

that Edwards' use of force was reasonable in order to bring a potentially volatile situation under control.

C. Right Not Clearly Established

Even if it could be said, on the facts as alleged, that Edwards' use of force was unreasonable, and thus unlawful, it would not necessarily have been clear to a reasonable officer that the amount of force used was problematic. That is, it could not be said that the right to be free from the kind of force Edwards used in the situation was clearly established. Because an outstanding issue of material fact remained as to whether Edwards used excessive force, the district court did not analyze whether a reasonable officer would know that the force used was unlawful. But in *Saucier,* the Supreme Court rejected this approach. The Court reversed the Ninth Circuit, which had upheld the district court's denial of summary judgment based on qualified immunity because an issue of material fact remained on the excessive force claim. The Ninth Circuit viewed the question of whether an officer was reasonable in believing his actions were lawful in light of clearly established law, and the question of reasonableness on the merits of the Fourth Amendment claim, as the same inquiry. However, the Supreme Court made clear the importance of proceeding in order through both steps – determining whether the facts alleged showed a constitutional violation, and then whether a reasonable officer would believe his actions were unlawful in light of clearly established law. This, the Court noted, allows for the elaboration of and advancement toward an understanding of the law from case to case. *Saucier,* 533 U.S. at 201. The Court said:

> [t]he approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.

Id. at 202 (internal quotation and citations omitted).

Thus, on the facts alleged by Kenyon, we do not believe the state of the law at the time of this incident was such that it would be clear to a reasonable officer that Edwards' conduct was unlawful in the situation he confronted at the derby. *Kuha v. City of Minnetonka,* 365 F.3d 590, 601-02 (8th Cir. 2003). Though it is clearly established that the Fourth Amendment bars the use of excessive force generally, we must keep in mind that the right must be clearly established "in a more particularized . . . sense" such that the "contours of the right" make it clear to officers what the law is in a given circumstance. *Saucier,* 533 U.S. at 202 (internal quotations omitted).

Kenyon points principally to *Goff v. Bise,* 173 F.3d 1068 (8th Cir. 1999), *Kopec v. Tate,* 361 F.3d 772 (3d Cir.), *cert. denied,* 543 U.S. 956 (2004), and *Kostrzewa v. City of Troy,* 247 F.3d 633 (6th Cir. 2001), to argue that the right to be free from the force Edwards used in the situation he faced was clearly established. But these cases do not present facts akin to those faced by Edwards in his confrontation with Kenyon. In *Goff,* we affirmed the denial of qualified immunity where a police officer and town mayor arrested the plaintiff, tightly cuffed him, threw him to the

ground, and choked him to unconsciousness in a situation where personal animosity may have motivated the arrest and where the plaintiff did not pose a threat. In *Kopec,* a police officer handcuffed the plaintiff so tightly that he began to faint and writhed in pain on the ground for about ten minutes after the plaintiff refused to provide the officer personal information, following the officer's demand that the plaintiff and his girlfriend desist their frolicking trespass onto a frozen pond. The court in *Kopec* held that the officer's failure to respond promptly to the plaintiff's painful pleas in what were "rather benign circumstances" where the officer did not face a "dangerous situation" constituted excessive force. 361 F.3d at 777. In *Kostrzewa,* the court denied qualified immunity where the plaintiff was stopped for a routine traffic violation, tightly handcuffed, and then battered about the back of a squad car by the intentionally reckless driving of the arresting officers. In *Kukla v. Hulm,* 310 F.3d 1046 (8th Cir. 2002), the court upheld the denial of qualified immunity where officers arrested plaintiff for refusing to sign a ticket for failure to produce a trucker log book, and in the process forced him against his truck, twisted his arm high behind his back injuring his collar bone, and broke his wrist with the handcuffs. The court found that the minor infraction and lack of a safety threat merited denial of immunity. In none of these cases did the officers face the charged and potentially dangerous atmosphere that Edwards faced in arresting Kenyon, where physical violence had already occurred and a large crowd with access to weapons of opportunity stood nearby.

Based on the state of the law and given the facts as alleged by Kenyon, we do not find that a reasonable officer

would have believed that the force Edwards used was unlawful.

III. CONCLUSION

Because, given the facts as alleged by Kenyon, we believe no constitutional violation occurred and, alternatively, that a reasonable officer would not believe the force used here to be excessive, we find that Edwards is entitled to qualified immunity. We therefore reverse and remand.

SMITH, Circuit Judge, dissenting.

I respectfully dissent. When reviewing a grant or denial of qualified immunity, we recite the facts and view the evidence in the light most favorable to plaintiff Kenyon, accepting his account of the facts as true where there are material inconsistencies. *E.g., Guite v. Wright,* 147 F.3d 747, 749 (8th Cir. 1998). The majority opinion, however, gives too little deference to Kenyon's version of the facts. The facts alleged by Kenyon, if true, establish that Edwards violated a clearly established constitutional right to be free from excessive force.

Kenyon alleged that as he was being handcuffed – in what several witnesses testified was an unnatural motion – he yelled that Edwards was badly hurting his arm. Edwards replied, "If you don't shut your mouth, I'm gonna break the thing off." Several witnesses at trial, including Kenyon, also testified that Kenyon did not resist arrest and that he only told the deputies that they were hurting his arm. Virginia Noah, Judith Rhodes, and Karen Cummins testified that Kenyon's head was banged repeatedly against the car during the handcuffing. Assuming, as we

must, that Kenyon did not resist, Edwards's conduct potentially classifies as gratuitous and excessive force.

The majority adopts Edward's characterization of the crowd, viewing it as hostile and with easy access to weapons, and also ignores the fact that four armed policemen were present during the handcuffing. The threat posed by the crowd, if any, to Edwards is a fact that should be resolved by the jury. The threat posed by Kenyon, if any, was minor, according to his account and that of several witnesses at trial. Although Kenyon was arrested on two misdemeanor charges, he was acquitted of one and the other was dismissed.[2]

Finally, the majority makes no mention of the testimony favorable to Kenyon's claim that Edwards used an unorthodox method of handcuffing that was not officially sanctioned. Officer Folk, who received training from the same employer as Edwards, testified that when properly handcuffing an arrestee, one should bring the arm and hand down by the arrestee's side and then around to the back. Edwards contends that Officer Folk's testimony supports the notion that the technique of bringing a suspect's raised arm behind his back represents a law enforcement technique that is taught in training classes, pointing to Officer Folk's statement that "[w]ell, it depends on which training class you take" after he was asked if the raised-arm technique was proper. However, Edwards's argument takes Officer Folk's statements out of context. Folk went on to state that he had been shown the raised-arm technique

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[2] A jury *acquitted* Kenyon on the third-degree battery charge, and the public intoxication charge was dismissed. The majority makes no mention of any of this. Instead, the majority implies Kenyon's guilt on the charges.

informally by an ex-Marine in 1969. He further stated that "I never did hear nothing about using that style but he [the ex-Marine] wasn't certified back then" and that his training updates have continued to teach the method of bringing the arm behind the back after it has been lowered. Viewing the evidence in the light most favorable to Kenyon, it appears that Officer Folk considered the raised-arm technique unorthodox and not officially sanctioned.

These questions – whether Kenyon was resisting; whether Edwards made comments indicating an intent to cause gratuitous injury; whether the four deputies actually had control over the crowd; and whether the handcuffing technique was unorthodox – constitute material, disputed issues of material fact that should not be tried by this court on appeal.

I also disagree with the majority on the qualified immunity analysis. "We analyze excessive force claims occurring in the context of seizures under the Fourth Amendment, using its reasonableness standard." *Henderson v. Munn,* 439 F.3d 497, 502 (8th Cir. 2006). "To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Id.* (quoting *Littrell v. Franklin,* 388 F.3d 578, 583 (8th Cir. 2004) (quoting *Greiner v. City of Champlin,* 27 F.3d 1346, 1354 (8th Cir. 1994))) (internal quotations omitted). "Circumstances such as the severity of the crime, whether the suspect posed a threat to the safety of the officers or others, and whether the suspect was resisting arrest are all relevant to the reasonableness of the officer's conduct." *Id.* (quoting *Foster v. Metro. Airports Comm'n,* 914 F.2d 1076, 1081 (8th Cir. 1990) (citing *Graham v. Connor,* 490

U.S. 386, 396 (1989))). At this procedural juncture, we must decide whether Kenyon "presented sufficient proof in support of his claim, if believed, to allow a reasonable jury to find the degree of force used against him was not 'objectively reasonable.'" *Id.* On this record, Kenyon satisfies this standard.[3]

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[3] Kenyon presented sufficient proof to allow a jury to reasonably conclude that the force used against him was objectively unreasonable: First, Officer Folk testified that the proper manner of handcuffing someone was to bring the arm and hand down by their side and then around to the back. Officer Folk also indicated that the raised-arm technique is unorthodox. Second, Kenyon presented the testimony of several witnesses to his arrest, all of whom testified that Kenyon was not resisting arrest other than to the extent that he sought to avoid sustaining injury to his arm from Edwards's technique. Third, Kenyon was being arrested for misdemeanors. Fourth, at the time that Edwards allegedly used excessive force, Kenyon was immobilized. Deputies Edwards and Hale held Kenyon by the arms with his face down on a car, and Edwards proceeded to handcuff Kenyon. Edwards testified that he had control of Kenyon even before Hale arrived. (App. 62). Again, several witnesses testified that Kenyon was not resisting arrest. Fifth, Kenyon's alleged injury, a torn rotator cuff that required surgery, tends to establish that excessive force may have been used by Edwards. *Cf. Wertish v. Krueger,* 433 F.3d 1062, 1067 (8th Cir. 2006) ("[B]ecause some force was reasonably required to arrest and handcuff [the plaintiff], his relatively minor scrapes and bruises and the less-than-permanent aggravation of a prior shoulder condition were *de minimis* injuries that support the conclusion that [the officer] did not use excessive force.").

Edwards's torquing of Kenyon's arm "may have been a 'gratuitous and completely unnecessary act of violence,'" in violation of Kenyon's Fourth Amendment rights. *Henderson,* 439 F.3d at 503 (quoting *Fontana v. Haskin,* 262 F.3d 871, 880 (9th Cir. 2001)) (brackets omitted). Accepting these facts as true, which we must at this procedural posture, Kenyon presented sufficient proof in support of his claim to allow a jury to conclude reasonably that the degree of force used was not objectively reasonable under the Fourth Amendment.

"The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person." *Guite,* 147 F.3d at 750 (citing *Graham,* 490 U.S. 386); *accord Henderson,* 439 F.3d at 503. The right "must be defined at the appropriate level of specificity before a court can determine whether it was clearly established." *Craighead v. Lee,* 399 F.3d 954, 961 (8th Cir.), *cert. denied,* 126 S. Ct. 472 (2005) (citing *Saucier v. Katz,* 533 U.S. 194, 202 (2001); *Brosseau v. Haugen,* 543 U.S. 194, 199-200 (2004) (per curiam)). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.* (quoting *Hope v. Pelzer,* 536 U.S. 730, 741 (2002)) (internal quotations omitted). Instead, the issue is whether prior cases would have put a reasonable officer on notice that the degree of force used would violate the plaintiff's right not to be subjected to excessive force. *Craighead,* 399 F.3d at 962-63.

The relevant case law supports the conclusion that the right to be free from excessive force in handcuffing was clearly established when Edwards arrested Kenyon – in this circuit and in other circuits. *Goff v. Bise,* 173 F.3d 1068, 1073 (8th Cir. 1999); *accord Kopec v. Tate,* 361 F.3d 772, 777 (3d Cir. 2004); *Kostrzewa v. City of Troy,* 247 F.3d 633, 641 (6th Cir. 2001); *see Henderson,* 439 F.3d at 503; *Guite,* 147 F.3d at 750.

Goff bolsters the denial of qualified immunity in the case at bar. In *Goff,* the plaintiff was tightly cuffed and choked, receiving a less substantial injury than Kenyon's torn rotator cuff. Moreover, although personal animosity was present in *Goff,* Edwards's comments during his

arrest of Kenyon could indicate an intent to cause gratuitous injury. Whether an officer's desire to inflict unnecessary pain is motivated by personal animosity, as in *Goff,* or by some other inappropriate intent is immaterial. Furthermore, Edwards testified that he had control of Kenyon even before the other three deputies arrived. Considering that four deputies were present and that Kenyon was not resisting, it is unclear how Kenyon posed any more of a threat than did the plaintiff in *Goff* – both men were subdued before the unnecessary force was used against them. In sum, *Goff* supports Kenyon's contention that the right to be free from excessive force in handcuffing was clearly established.

Other circuits have held that the right to be free from excessive force in handcuffing is clearly established. *E.g., Kopec,* 361 F.3d at 777-78 (holding that officer used excessive force by placing excessively tight handcuffs on the plaintiff and refusing to loosen them for ten minutes); *Kostrzewa,* 247 F.3d at 641 (holding that allegation of excessively tight handcuffing establishes constitutional violation). In *Kostrzewa,* the Sixth Circuit stated, "This circuit has held that the right to be free from excessive force, including 'excessively forceful handcuffing,' is a clearly established right for purposes of the qualified immunity analysis." 247 F.3d at 641 (citations omitted). Given this language, *Kostrzewa* turned upon the tight handcuffing of the plaintiff independently and without regard to the officers' intentionally reckless driving, as the majority indicates.

For the foregoing reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 05-3487

David Kenyon,

Appellee

v.

Clayton Edwards, individually,

Appellant

Lt. Jim Hale, Individually, et al.,

Appeal from U.S. District Court for the Eastern District of Arkansas – Little Rock
(4:04-cv-00131-HDY)

ORDER

(Filed May 1, 2007)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

BEAM, Circuit Judge, with whom RILEY, Circuit Judge, joins, dissenting.

Before this en banc panel is defendant's motion to reconsider the court's order dated January 18, 2007, affirming, "by vote of an equally divided court" a district court order concerning defendant's right to qualified immunity. This en banc affirmance, by its adoption of a district court order that (1) failed to rule on defendant's

timely motion for qualified immunity and (2) made qualified immunity a question of fact, erroneously denies Officer Edwards' well-established qualified immunity protections, in clear violation of recent, substantial and binding Supreme Court and circuit precedent. From this result, I dissent.

BACKGROUND

I adopt by reference the factual emanations found in the panel opinion and dissent, *Kenyon v. Edwards,* 462 F.3d 802 (8th Cir. 2006), *vacated,* (Nov. 22, 2006), although, for reasons outlined later, I reject as wholly irrelevant factual contentions in the panel dissent concerning Officer Edwards' state of mind at the time of the incidents in question. I set forth specific facts from these sources and elsewhere in the record as they may be helpful in explaining my concerns.

The plaintiff, David Kenyon, was arrested at a demolition derby in Searcy, Arkansas, by Officer Edwards and three other policemen, Lt. Jim Hale, Jeremiah Ervin and Dan Jarry. In the course of the arrest, Kenyon was handcuffed, with some or all of the other officers physically participating. During this occurrence, Kenyon claims that his rotator cuff was injured. Whether or not this injury resulted from the cuffing is a disputed fact. The stated grounds for the arrest were domestic battery and public intoxication. There is no dispute that when Officer Edwards arrived at the scene, Shirley Cox, Kenyon's ex-wife, was injured, Cox told Edwards that Kenyon had hit her and Kenyon smelled of alcohol when approached by Edwards. Indeed, Kenyon concedes that Edwards had probable cause to arrest him for domestic battery and

public intoxication. Joint Appendix at 98 (Response to Statement of Indisputable Material Facts). He was later acquitted of battery. The intoxication charge was dismissed.

Thereafter, Kenyon sued Edwards, Hale, Ervin and Jarry claiming violations of his rights under the Fourth and Fourteenth Amendments to the Constitution. The alleged offending transgressions resulted in charges of false arrest and use of excessive force by the officers. The issue of the immunity of the police officers was not raised initially and the case went to trial before a jury. The jury unanimously found that there was no false arrest by any defendant and that Hale, Ervin and Jarry used no excessive force. The jury was divided on whether Edwards had applied excessive force, causing the district court to declare a mistrial and schedule a new trial. Subsequently, Edwards sought qualified immunity through a motion for summary judgment. The parties tendered, by depositions and otherwise, trial and discovery evidence in support and defense of their respective positions. Appellate review of the district court's handling of this qualified immunity defense is the only matter now before this en banc panel, the three judge panel opinion having been vacated by vote of the circuit judges in regular active service.

In considering the question of qualified immunity, the district court correctly articulated the two-step analysis outlined in *Saucier v. Katz,* 533 U.S. 194 (2001), a case I discuss in more detail hereinafter. In this regard, the district court said:

> First, [the court asks] whether the facts as asserted by the plaintiff "show the officer's conduct violated a constitutional right." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). If the answer is no, [the

> court grants] qualified immunity. If the answer is yes, [the court goes] on to determine "whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

Kenyon v. Edwards, No. 4:04CV00131, 2005 WL 2176937, at *3 (E.D. Ark. Aug. 31, 2005) (alterations in original).

In its opinion and order dealing with these issues, the district court further held that if the facts on the issue of excessive force are "as asserted by Kenyon, . . . Edwards' conduct violated a constitutional right." *Id.* But, on the second *Saucier* question, i.e., whether a constitutional violation would have been clear to a reasonable officer under "the situation he confronted," the district court stated, "[a]t this juncture of the proceeding, it is impossible to say because a material question of fact exists." *Id.* Qualified immunity was denied. There is no further explication of what fact or facts remained to be decided and by whom or at which of the two *Saucier* steps they must be determined. The opinion and order of the district court, now affirmed by the en banc panel, answered neither of the two *Saucier* questions, both of which are questions of law under relevant precedent. The district court also wholly ignored this court's holding in *Schatz Family ex rel. Schatz v. Gierer,* 346 F.3d 1157 (8th Cir. 2003), which requires a district court to actually rule on a public official's timely motion for qualified immunity. Taken together, the two courts' respective orders throw the qualified immunity law of this circuit into ever increasing disarray.

DISCUSSION

A.

The Supreme Court in *Saucier* explained, as noted by the district court, that qualified immunity is a two-step inquiry. The first inquiry is whether a constitutional right is violated under the facts alleged. *Saucier,* 533 U.S. at 200. The second inquiry, assuming that such a violation is established, is whether the violated right was clearly established upon consideration of the particular incident at a specific factual level, and not on a basis of legal generalities. *Id.* Both inquiries are questions of law, which, on appeal, are reviewed de novo. *Robinette v. Jones,* 476 F.3d 585, 591 (8th Cir. 2007) (citing *Liebe v. Norton,* 157 F.3d 574, 576 (8th Cir. 1998)). This is so because "[w]hether an official is entitled to qualified immunity depends upon the 'objective legal reasonableness' of the official's actions 'assessed in light of the legal rules that were "clearly established"' at the time of the actions in question." *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)).

As *Mitchell v. Forsyth* noted, the Supreme Court in *Harlow v. Fitzgerald,* "purged [the] qualified immunity doctrine of its subjective components." 472 U.S. 511, 517 (1985) (citing *Harlow,* 457 U.S. 800 (1982)). In *Graham v. Connor,* the Court said "[a]s in other Fourth Amendment contexts . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." 490 U.S. 386, 397 (1989).

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell,* 472 U.S. at 526. The privilege "is an *immunity from suit* rather than a mere defense to liability." *Id.* "[A]nd like an absolute immunity, it is effectively lost if a case is erroneously permitted [or required] to go to trial." *Id.* As a result, the Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest stage of litigation. *E.g., Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (per curiam). Accordingly, Officer Edwards was and is clearly entitled to have the district court rule on his immunity defense, using the *Saucier* two-step approach. This, of course, has not occurred and will not occur given the en banc panel's proposed implementation of the equally divided court rule.

While it is not entirely clear what the district court purported to do, it is perfectly clear what it did not do. It did not follow the requirements of either *Schatz* or *Saucier.* The district court appears to have ruled that if a jury (or other undisclosed fact-finder) gives Kenyon's allegations their best factual gloss, Edwards violated Kenyon's constitutional right to be free from the use of excessive force. The district court does not appear to have dealt with *Saucier's* second question at all. If the district court's cryptic order means that there are facts yet to be determined at this second step, this would constitute an even more egregious violation of both Supreme Court and circuit precedent. In reality, then, as earlier indicated, the district court ignored both *Schatz* and *Saucier* but the en banc panel now affirms this procedure through misuse of the evenly divided court affirmance rule.

Schatz and the equally divided court rule aside, the district court apparently attempted to follow the route

taken by the Ninth Circuit in *Saucier,* a pathway that was specifically and soundly rejected by the Supreme Court. In *Saucier,* the Supreme Court, rejecting the approach taken by the Ninth Circuit and the en banc and district courts here, said, "because of the limits imposed upon us by the questions on which we granted review, we will assume [as a matter of law] a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force," 533 U.S. at 207, and we will "then proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances this officer [Saucier] faced." *Id.* at 207-08. But, the district court, and the en banc panel by its affirmance of the district court, did not and does not now propose to afford Officer Edwards either the full benefit of the first *Saucier* step or any of the benefits of the second *Saucier* step. The approach the district court adopted " – to deny summary judgment any time a material issue of fact remains on the excessive force claim – [undermines] the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Id.* at 202 (quoting *Harlow,* 457 U.S. at 818).

B.

Another important question raised by the present posture of this appeal is whether, as a matter of law, the en banc panel was correct in its failure to grant, on de novo review, Officer Edwards' motion for summary judgment, given the evenly divided en banc court.

If the state of the law did not put Officer Edwards on notice that his conduct was clearly unconstitutional, qualified immunity is required. *Malley v. Briggs,* 475 U.S. 335, 345 (1986). And, Edwards is not required to be a constitutional specialist as the en banc panel now seemingly holds. Clearly established, for purposes of qualified immunity, means that the contours of the right must be clear enough that a reasonable officer under the particular circumstances of a specific arrest would understand that what he is doing violates a constitutional right. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). There are few, if any, cases that definitively outline the nature and character of this inquiry. Nonetheless, the Supreme Court has provided some guidance that clearly places Edwards on the immunity side of the line. *Wilson v. Layne,* 526 U.S. 603 (1999), cited by Edwards in his petition for reconsideration, provides one such test. In *Wilson,* a police agency allowed the presence of ride-along members of the media inside homes where the agency was serving arrest warrants. This was ultimately deemed to be a constitutional violation by the Supreme Court. But, when it became evident that at the time of the acts there existed a split among the federal courts on whether media "ride-alongs" could constitutionally enter homes with police personnel, the Supreme Court said, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.*, at 618.

Likewise, the Sixth Circuit, in a *Bivens* case involving a search using a defective warrant, citing *Wilson v. Layne,* held that federal agents "did not violate clearly established law," because there were disagreements on the constitutional issue between it and the Ninth Circuit. *Baranski v.*

Fifteen Unknown Agents, 452 F.3d 433, 449 (6th Cir. 2006) (en banc); *see also McCabe v. Macaulay*, 450 F. Supp. 2d 928, 948 (N.D. Iowa 2006) (when the right has not been clearly established by the Supreme Court or the circuit in which the district court sits and other circuits are split on the issue, it cannot be said that the defendant has violated a clearly established right); *Johnson v. Riggs*, No. 03-C-219, 2005 WL 2249874, at *12 (E.D. Wis. Sept. 15, 2005) (same). While not precisely on point here because the disagreements in these cases were between courts and not an evenly divided number of judges in the same circuit, these holdings should guide us to a reasonable outcome in this case.

As earlier noted, the jury, upon receiving Eighth Circuit Model Jury Instruction No. 3.04 on the elements of excessive force, acquitted three of the four police officers and could not agree upon Officer Edwards. On appeal before the three-judge panel, two of the three United States Circuit Judges found that no constitutional violation was made out by Kenyon and that a reasonably objective police officer would not have believed he or she was violating the Constitution. When the two issues were presented to the en banc panel of twelve judges, six found either no constitutional violation or, at least, that the contours of the asserted right were not reasonably discernible to an objective police officer confronted by this same situation. To now require Officer Edwards to go through another jury trial under these circumstances is clearly contrary to the above-cited cases and abundant other binding precedent of this circuit carefully considered by the three-judge panel majority.

I concede that the Supreme Court rule affirming a district court when the appellate court is evenly divided is

venerable and often utilitarian, but it should not lead to violation of other, later binding Supreme Court precedent. The divided court rule insofar as it might be applicable here, dates at least to Justice Field's 1868 opinion for the Supreme Court in *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 112 (1868), if not earlier. A more recent explication of the rule is found in *Neil v. Biggers,* 409 U.S. 188, 191-92 (1972). *Neil* discusses some of the history of the equally divided court rule, citing *The Antelope,* 23 U.S. (10 Wheat.) 66, 126-27 (1825), *Etting v. Bank of United States,* 24 U.S. (11 Wheat.) 59, 78 (1826) and *Durant.* These cases and all other cases that I have found, deal with matters in which the lower court entered judgments fully dealing with the underlying merits of particular litigation, contrary to the *Schatz* violation we have here.

Neil stands for the proposition that even a merits judgment affirmed by an evenly divided court has neither binding effect on a collateral issue nor precedential weight. In *Neil,* Justice Powell noted that the Tennessee Supreme Court had earlier affirmed Biggers' rape conviction which was, in turn, on certiorari, affirmed by an equally divided United States Supreme Court. *Biggers v. Tennessee,* 390 U.S. 404 (1968) (per curiam). The issue before the United States Supreme Court in *Neil,* was whether this affirmance by an equally divided court in *Biggers v. Tennessee* was an "actual adjudication [statutorily] barring subsequent consideration" of a station house identification issue in a later federal habeas proceeding. *Neil,* 409 U.S. at 190. The Supreme Court permitted federal habeas review of the identification issue, deciding not to impose a statutory bar arising from the *Biggers v. Tennessee* affirmance "because of the absence of a majority position" by the Supreme Court on the state conviction. *Id.*

at 192. Here, contrary to *Neil* precedent, the en banc court's equally divided affirmance of a district court non-merits order will have the effect of taking Officer Edwards back to trial without any actual adjudication of his right to qualified immunity.

Durant, decided well before the day that interlocutory appeals on the issue of qualified immunity appeared on the judicial horizon, likewise demonstrates, but in a slightly different way, the impropriety of the en banc panel's order in this case. Justice Field states that affirmance of the court below, here the district court,

> is, indeed, the settled practice in such [a] case . . . ; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

Durant, 74 U.S. at 112. If this appeal is in essence dismissed and the district court's present order is enforced as a result, as Justice Field opined it should be, Officer Edwards goes back to trial before a jury in clear violation of Supreme Court precedent established one hundred and thirty-three years later.

Two additional cases dealing directly with the equally divided rule and qualified immunity, *Kissinger v. Halperin,* 452 U.S. 713 (1981) (per curiam) and *Norwood v. Bain,* 166 F.3d 243 (4th Cir. 1999) (en banc) (per curiam), are likewise unhelpful. Neither involve a failure or refusal to determine the availability of qualified immunity and

neither had the benefit of the immunity determination procedures mandated by *Saucier.*

Application of any court-made rule should not result in a judicial attempt to force a square peg into a round hole. Its use must be rational, must accommodate binding precedent and must serve the ends of justice. Instead of forcing this untoward result, the en banc panel order should, at least, follow *Schatz's* reasoning and remand this matter to the district court with directions to follow the marching orders of *Saucier,* rather than affirming the entirely improvident district court order. More appropriately though, the en banc panel should follow the dictates of *Wilson v. Layne* and grant Officer Edwards qualified immunity as a matter of law.

SUMMARY AND CONCLUSION

In summary, giving plaintiff Kenyon's allegations the most charitable reading possible, the district court tentatively determined that Officer Edwards possibly violated Kenyon's constitutional right to be free from excessive force. On this tenuous basis alone, and without ruling on Edwards' contention that a reasonable officer under the specific facts of this situation would not have known he was violating Kenyon's rights, the district court denied Edwards qualified immunity and set the underlying dispute for trial. At the previous trial, as also earlier noted, some number of the members of the jury rejected Kenyon's factual allegations. On appeal to a three-judge panel, two members of the panel rejected Kenyon's constitutional and reasonable knowledge claims. On appeal to a twelve-member en banc panel, six members of the en banc court would have granted Edwards immunity on one or

both of his *Saucier* claims. So, although Kenyon has not mustered a necessary majority vote on any of the underlying or interlocutory claims at any point in this dispute, Officer Edwards is headed back to a jury trial on the excessive force claim through the unfortunate misapplication of the so-called equally divided court rule.

We should never condone police brutality. Neither should we disregard the difficulties inherent in the work of our police community. The people of Searcy, Arkansas, sent Officer Edwards into a dicey situation in which he was forced to encounter plaintiff Kenyon, a less than cooperative individual based on undisputed portions of the record before us. Although Edwards handled his duties in a totally lawful manner in the view of some jurors and at least two (or perhaps more) of the circuit judges reviewing the matter, he now finds his time, reputation and personal assets in jeopardy at a jury trial that should not be allowed to occur.

From this result I dissent. And if a majority of the en banc panel insists on pursuing this course of action, I urge Officer Edwards to seek relief through writ of certiorari to the United States Supreme Court.

May 01, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans